

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Xintian Yu,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-0172
	§	
Michael Chertoff, Secretary of the	§	
Department of Homeland Security, <i>et al.</i> ,	§	
Defendants.	§	

AMENDED MEMORANDUM AND RECOMMENDATION

In light of the Fifth Circuit’s recent decision in *Walji v. Gonzales*, 489 F.3d 738 (5th Cir. June 19, 2007), this court has reconsidered its recommendation issued on May 10, 2007 (Dkt. 12). The earlier recommendation adopted the holding of other district courts addressing the same issues presented to this court. *See e.g. Elmalky v. Upchurch*, No. 06-CV-2359-B, 2007 WL 944330 * 3 (N.D. Tex. 2007); *Duan v. Zamberry*, No. 06-1351, 2007 WL 626116 at * 3 (W.D. Pa. 2007). However, for the reasons stated in *Walji*, this court now recommends that this action be dismissed for want of subject matter jurisdiction.

Xintian Yu’s I-485 application to register as a permanent resident or adjust status has been pending for over two years without decision. Asserting that the adjudication of his application has been unreasonably delayed, Yu seeks relief in the form of a writ of mandamus under 28 U.S.C. § 1361 and the Administrative Procedures Act, 5 U.S.C. § 706(1). Nonetheless, as stated by the Fifth Circuit, “[g]overnment delay alone, unless it is shown to be in bad faith or extraordinary, does not warrant such an extraordinary remedy.” *See Walji*, 489 F.3d at 740 (observing mandamus is an extraordinary remedy, warranted only

when agency delay is egregious). Here, Yu has not alleged bad faith or extraordinary delay. Therefore, mandamus relief is not warranted.

Moreover, unlike the adjudication of naturalization applications, there is no statute granting a district court jurisdiction to consider I-485 applications. *See e.g.* 8 U.S.C. § 1447(b) (granting the district court jurisdiction to consider a naturalization application if it has been pending for more than 120 days after an examination has been completed). In *Walji*, the Fifth Circuit interpreted § 1447(b) such that the 120 day period is not triggered until the United States Citizenship and Immigration Services (USCIS) receives a “definitive response” from the FBI on the applicant’s name check. 489 F.3d at 740. However, prior to the completion of the name check investigation, the district court lacks jurisdiction to consider a naturalization application. *Id.* If the lack of an FBI name check precludes subject matter jurisdiction over naturalization proceedings under § 1447(b), which expressly contemplates judicial review, then *a fortiori* there is no subject matter jurisdiction over status adjustment proceedings under § 1255(a), which does not mention judicial review.

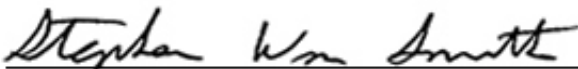
Nor is there any basis here for federal question jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* Under the APA a court can compel an agency to act when the agency “is compelled by law to act within a certain time period.” *Norton v. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). In adjustment of status cases, however, there is no statutory or regulatory provision compelling adjudication with a certain time period. *See* 8 U.S.C. § 1255(a); *Li v. Gonzales*, 2007 WL 1303000 (D. N.J. May 3, 2007), slip op.

at 7. To the contrary, there is a regulation which specifically confers discretion on immigration officers to withhold adjudication while applicants are investigated. 8 C.F.R. § 103.2(b)(18). The APA does not apply to agency action that is committed by law to discretion of the agency. 5 U.S.C. § 701 (a)(2). Accordingly, the court does not have subject matter jurisdiction over Yu's claim under the APA.

For these reasons, the court recommends that defendant's motion to dismiss be granted, and that Yu's petition should be dismissed for lack of subject matter jurisdiction.

The parties have ten (10) days from receipt of this Memorandum and Recommendation to file written objections. See FED. R.CIV.P. 72. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error.

Signed at Houston, Texas on August 2, 2007.


Stephen Wm Smith
United States Magistrate Judge